

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:1:TL-N-1811-01
VJKanrek

date:

to: Robert Skiba, Territory Manager, LM:FSH
Attention: Joseph Durak, Team Manager, Group 1111
John Nenadich, Revenue Agent, Group 1111

from: Area Counsel
(Financial Services and Healthcare:Manhattan)

subject: [REDACTED]
Execution of Form 872 to Extend the Statute of Limitations
On Assessment of Withheld Tax Under Sections 1441-1442 (Forms
1042) for the Taxable Years Ending during [REDACTED] through [REDACTED]

Statute of Limitations Expires: [REDACTED]

[REDACTED]
Execution of Form 872 to Extend the Statute of Limitations
On Assessment of Withheld Tax Under Sections 1441-1442 (Forms
1042) for the Taxable Years Ending during [REDACTED] through [REDACTED]

Statute of Limitations Expires: [REDACTED]

[REDACTED]
Execution of Form 872 to Extend the Statute of Limitations
On Assessment of Income Tax (form 1120) for the Taxable Year
Ended December 31, [REDACTED]

Statute of Limitations Expires : [REDACTED]

U.I.L, Nos. 6501.08-00, 6501.08-09, 6501.08-17

This memorandum is in response to your request for assistance on March 19, 2001, in the above-captioned matter concerning consents to extend the statute of limitations on assessment of withheld taxes for the tax years ending within the calendar years [REDACTED] through [REDACTED] of each of [REDACTED] (hereinafter "[REDACTED]") and [REDACTED] (hereinafter "[REDACTED]"), as well as a consent to extend the statute of limitations on assessment of income taxes of [REDACTED] for the taxable year ending December 31,

████. This memorandum should not be cited as precedent.

ISSUES

I. █████ - Withholding Taxes

1. Who is authorized to execute consents extending the statute of limitations on assessment of withheld taxes under sections 1441-1442 (Forms 872) for █████ for Form 1042 for its tax years ending within the calendar years █████ through █████?

2. What language should be used in this Form 872?

II. █████ - Withholding Taxes

1. Who is authorized to execute consents extending the statute of limitations on assessment of withheld taxes under sections 1441-1442 (Forms 872) for █████ for Forms 1042 for its tax years ending within the calendar years █████ through █████?

2. What language should be used in this Form 872?

III. █████ - Income Tax

1. Who is authorized to execute a consent extending the statute of limitations on assessment of income tax (Form 872) for █████ for Form 1120 for its taxable year ending December 31, █████?

2. What language should be used in this Form 872?

CONCLUSIONS

I. █████ Withheld Taxes.

1. An authorized officer of █████ (now █████) is authorized to execute consents extending the statute of limitations on assessment of withheld taxes (Forms 872) for █████ for its tax years ending within the calendar years █████ through █████.

2. Set forth below is suggested language to be included in the consents to be executed by an authorized officer of █████ (formerly known as █████) and its tax years ending December 31, █████, December 31, █████, December 31, █████ and December 31, █████.

II. █████ Withheld Taxes.

1. An authorized officer of █████ is authorized to execute

consents extending the statute of limitations on assessment of withheld taxes (Forms 872) for [REDACTED] for its tax years ending within the calendar years [REDACTED] through [REDACTED].

2. Set forth below is suggested language to be included in the consents to be executed by an authorized officer of [REDACTED] and its tax years ending December 31, [REDACTED], December 31, [REDACTED], December 31, [REDACTED] and December 31, [REDACTED].

III. [REDACTED] Income Tax.

1. Based on the representations of the taxpayers as contained in the [REDACTED] AGREEMENT AND PLAN OF MERGER AMONG [REDACTED] [REDACTED], [REDACTED] AND [REDACTED] and the [REDACTED] Form 8-K, CURRENT REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 submitted to the SECURITIES AND EXCHANGE COMMISSION, an authorized officer of [REDACTED] (formerly [REDACTED]) is authorized to execute a consent extending the statute of limitations on assessment of income tax (Forms 872) for [REDACTED] for its taxable year ending December 31, [REDACTED].

2. Set forth below is suggested language to be included in the consent to be executed by an authorized officer [REDACTED] [REDACTED] for [REDACTED] and its tax year ending December 31, [REDACTED].

FACTS

This opinion is based on the facts set forth herein. It may change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routing procedures which have been established for opinions of this type. We have referred this memorandum to the Office of Chief Counsel for review. That review might result in modification to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately ten days. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

[REDACTED] (E.I.N. [REDACTED]) filed corporate income tax returns on behalf of itself and its subsidiaries, as included within the consolidated return filed by [REDACTED] [REDACTED] (hereinafter "[REDACTED]"), for the taxable years ended December 31, [REDACTED], December 31, [REDACTED], December 31, [REDACTED] and December 31, [REDACTED], for each of those years. For the taxable year ended December 31, [REDACTED], the corporate income tax return [REDACTED] filed on behalf of itself was not included within the

consolidated return filed by [REDACTED]. [REDACTED] (E.I.N. [REDACTED]) (hereinafter "[REDACTED]") is an affiliate of [REDACTED].

By letter dated [REDACTED], [REDACTED] authorized certain individuals to receive from or inspect confidential tax information and discuss tax issues and adjustments with the Service with regard to Form 945 "Annual Return of Withheld Federal Income Tax" and various Forms 1099 filed by [REDACTED] for the calendar years ended December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED]. You have informed us that [REDACTED] retained its name and E.I.N. after the [REDACTED] merger transaction described below.

By memorandum dated [REDACTED], [REDACTED] (then the parent of [REDACTED]) authorized certain individuals to act with respect to the portions of the consolidated corporate income tax returns relating to [REDACTED] and its subsidiaries for the tax years ended December 31, [REDACTED] through December 31, [REDACTED]. Because [REDACTED] did not file its corporate income tax return as part of the consolidated return of [REDACTED], these designations are neither relevant nor dispositive of who may sign a Form 872 extending the statute of limitations on assessment of income tax for the tax year of [REDACTED] ending December 31, [REDACTED].

[REDACTED] and [REDACTED] each previously executed Forms 872 extending through [REDACTED] the statute of limitations on assessment of Federal Withholding Tax under I.R.C. sections 1441-1442 as to each of [REDACTED] and [REDACTED], respectively. Presumably, no Form 872 extending the statute of limitations on assessment of Federal income tax for the taxable year ending December 31, [REDACTED] of [REDACTED] has been necessary until now.

On [REDACTED], [REDACTED] became an indirect wholly owned subsidiary of [REDACTED], a corporation organized under the laws of Switzerland ("[REDACTED]"). Pursuant to a merger agreement (hereinafter the "[REDACTED] Merger Agreement"), the following transaction occurred: [REDACTED] ("[REDACTED]"), the purchaser, a Delaware corporation and an indirect wholly owned subsidiary of [REDACTED], acquired shares of [REDACTED] pursuant to a Tender Offer to [REDACTED] shareholders and a Stock Purchase from [REDACTED], formerly the ultimate parent of [REDACTED]. All such shares were transferred to [REDACTED] ("[REDACTED]"), formerly a wholly owned subsidiary of the [REDACTED]. [REDACTED] was merged into [REDACTED], and [REDACTED], now holding the shares of [REDACTED], was merged into [REDACTED] ("[REDACTED]"), a Delaware corporation and indirect wholly owned subsidiary of [REDACTED]. As a result of these mergers, [REDACTED] became a direct wholly owned subsidiary of [REDACTED] and an indirect wholly owned subsidiary of [REDACTED].

█████.

According to Article 3, Section 3.03 of the Merger Agreement, the separate corporate existence of █████ ceased to exist and █████ continued as the surviving corporation of the merger; however its name was changed to █████ (hereinafter █████). The Merger Agreement further provides that the effect of the merger shall be as provided in the applicable provisions of Delaware law, and that all the property, rights, privileges, powers and franchises of █████ and █████ shall vest in █████, and all debts, liabilities, obligations, restrictions, disabilities and duties of █████ and █████ shall become the debts, liabilities, obligations, restrictions, disabilities and duties of █████, as the surviving corporation.

█████, Chief Financial Administrative Officer and Director of █████, on letterhead of █████, provided a letter to the Service dated █████, in which he designated certain individuals as being authorized to execute Consents to Extend the Time to Assess Employment Taxes (IRS Forms 872 and SS-10) and to execute IRS Forms 5701, "Notice of Proposed Adjustments" and as authorized to receive from or inspect confidential tax information and discuss tax issues and adjustments with the Service with regard to corporate income tax returns filed by █████ and its subsidiaries, as included in the consolidated return filed by █████ of the United States, for the tax years ended December 31, █████ through December 31, █████, and with regard to the corporate income tax returns filed by █████ and its subsidiaries for the tax years ended December 31, █████ through █████.

DISCUSSION

I. █████ - Withheld Taxes

1. Who is authorized to execute Forms 872 for █████ consenting to extend the statute of limitations on assessment of withheld taxes under I.R.C. sections 1441-1442 (Forms 1042) for the tax years ending within the calendar years █████ through █████?

I.R.C. § 6501(a) provides generally that the amount of any tax shall be assessed within three years after the relevant tax return was filed. Under I.R.C. § 6501(c)(4), the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the previously existing period, i.e., either the original statutory period set forth in I.R.C. § 6501(a) or an

extended period establish in a prior written extension agreement between the parties. A Form 872, Consent to Extend the Time to Assess Tax, is used to so extend the limitations period.

Since the withheld tax liabilities were not part of a consolidated return for the taxable years in issue, [REDACTED] would generally be the proper party to sign the consents. Based on the facts as we understand them, [REDACTED] was acquired by [REDACTED] on [REDACTED], and continues its corporate existence, however, it now operates as [REDACTED]. Accordingly, the Form 872 should bear the following caption: "[REDACTED], (EIN: [REDACTED]) formerly known as [REDACTED], (EIN: [REDACTED])."

Under § 6061, any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. In the case of corporate returns, § 6062 provides that a corporation's income tax return shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The regulations under § 6501(c)(4) do not specify who may sign consents executed under this section. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. Under Treas. Reg. § 1.6062-1, returns that are required to be made by corporations under the provisions of subtitle A or subtitle F of the Internal Revenue Code with respect to any tax imposed by subtitle A (which includes the §§ 1441-1442 withholding taxes) shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to sign such returns. Accordingly, any such officer of [REDACTED] is authorized to sign the consents.

2. What language should be used in this Form 872?

As previously stated, the Form 872 should bear the following caption:

[REDACTED], (EIN: [REDACTED]), formerly known as [REDACTED], (EIN: [REDACTED]).*

Further, we suggest the following language for the footnote:

* - With respect to the withholding tax liabilities under sections 1441-1442 of [REDACTED] for

the taxable years ended December 31, [REDACTED], December 31, [REDACTED], December 31, [REDACTED] and December 31, [REDACTED].

II. [REDACTED] - Withheld Taxes

1. Who is authorized to execute Form 872 for [REDACTED] consenting to extend the statute of limitations on assessment of withheld taxes under I.R.C. sections 1441-1442 (Forms 1042) for the tax years ending within the calendar years [REDACTED] through [REDACTED]?

I.R.C. § 6501(a) provides generally that the amount of any tax shall be assessed within three years after the relevant tax return was filed. Under I.R.C. § 6501(c)(4), the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the previously existing period, i.e., either the original statutory period set forth in I.R.C. § 6501(a) or an extended period establish in a prior written extension agreement between the parties. A Form 872, Consent to Extend the Time to Assess Tax, is used to so extend the limitations period.

Since the withholding tax liabilities were not part of a consolidated return for the taxable years in issue, [REDACTED] is the proper party to sign the consents. Under § 6061, any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. In the case of corporate returns, § 6062 provides that a corporation's income tax return shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The regulations under § 6501(c)(4) do not specify who may sign consents executed under this section. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. Under Treas. Reg. § 1.6062-1, returns that are required to be made by corporations under the provisions of subtitle A or subtitle F of the Internal Revenue Code with respect to any tax imposed by subtitle A (which includes the §§ 1441-1442 withholding taxes) shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to sign such returns. Accordingly, any such officer of [REDACTED] is authorized to sign the consents.

2. What language should be used in this Forms 872?

Based on the facts as we understand them, [REDACTED] continued to

exist after the [REDACTED], merger transaction described above, and retained its E.I.N. Accordingly, the Form 872 should bear the following caption:

[REDACTED]
(EIN: [REDACTED]).

III. [REDACTED] - Income Tax

1. Who is authorized to execute a Form 872 for [REDACTED] consenting to extend the statute of limitations on assessment of income tax for [REDACTED] (Form 1120) for the taxable year ending December 31, [REDACTED]?

I.R.C. § 6501(a) provides generally that the amount of any tax shall be assessed within three years after the relevant tax return was filed. Under I.R.C. § 6501(c)(4), the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the previously existing period, i.e., either the original statutory period set forth in I.R.C. § 6501(a) or an extended period establish in a prior written extension agreement between the parties. A Form 872, Consent to Extend the Time to Assess Tax, is used to so extend the limitations period.

You have informed us that [REDACTED] filed its own corporate income tax return for the taxable year ended December 31, [REDACTED], i.e., one that was not part of a consolidated return. Accordingly, the rules regarding consolidated returns will not determine who should sign a Form 872 consenting to extend the statute of limitations on assessment for [REDACTED]'s [REDACTED] taxable year.

Neither I.R.C. § 6501(c)(4) nor the regulations thereunder specify who may sign consents. The Service therefore applies the rules applicable to the execution of the original returns to the execution of Forms 872. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

I.R.C. § 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. I.R.C. § 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or other officer duly authorized to act on behalf of the corporation. Accordingly, any such corporate officer may sign a Form 872, whether or not that individual signed the related corporate income tax return. Rev. Rul. 84-165, 1984-2 C.B. 305.

The effect of the merger, as set forth in the Merger Agreement, is that [REDACTED] continues its corporate existence, with a new name and E.I.N. therefore, based upon the foregoing facts, a Form 872 extending the assessment limitations period for the tax year ending December 31, [REDACTED], of [REDACTED] should be executed by an authorized officer of [REDACTED].

2. What language should be used in this Form 872?

We suggest that the following language be used in a Form 872 to extend [REDACTED]'s tax year ending December 31, [REDACTED]:

[REDACTED] (EIN [REDACTED]),
formerly known as [REDACTED] (EIN [REDACTED]) *

Further, we suggest the following language for the footnote:

* - With respect to the consolidated liabilities of [REDACTED] for the taxable year ending December 31, [REDACTED].

PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the I.R.S. Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service, each time that it requests a taxpayer to extend the limitations period, to advise the taxpayer of the right (i) to refuse to extend the statute of limitations on assessment, or, in the alternative, (ii) to limit an extension to particular issues or for specific periods of time,. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayers when you solicit the consents. Alternatively, you may advise the taxpayers orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the IRM requires use of Letter 907(DO) to solicit a Form 872, Letter 928(DO) as a follow-up letter to Letter 907(DO) (when appropriate), and Letter 929(DO) to transmit a copy of the executed consent to the taxpayer. See IRM Handbook No. 121.2.22.3 and No. 121.2.22.4.2. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Forms 872 are received from the taxpayers, the responsible manager should promptly sign and date them in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM,

Handbook No. 121.2.22.5.10. The manager must also update the respective statutes of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 121.2.22.5.11(1)(g). In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

This advice relates solely to the facts of this case and should not be used or applied to the facts of any other case. If you have any questions concerning this memorandum, please contact Victoria J. Kanrek at (212) 264-1595, ext. 238.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROLAND BARRAL
Area Counsel - LMSB Area 1

By: _____
VICTORIA J. KANREK
Senior Attorney